UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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ENVIRONMENTAL PROTECTION AND INFORMATION CENTER, a California nonprofit corporation; and KLAMATH-SISKIYOU WILDLANDS CENTER, an Oregon nonprofit corporation,

Plaintiffs,

v.

JACK BLACKWELL, in his official capacity as Regional Forester for the Southwest Pacific Region of the United States Forest Service; MARGARET BOLAND, in her official capacity as Forest Supervisor for the Klamath National Forest; and UNITED STATES FOREST SERVICE,

Defendants.

NO. CIV. S-04-1027 WBS GGH

MEMORANDUM AND ORDER

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The court is called upon to review the Finding of No Significant Impact ("FONSI") issued by defendant Forest Service ("FS") in October 2003 regarding the proposed harvesting and sale of timber in the Westpoint area of the Klamath National Forest (the "project"). Plaintiffs and defendants both move for summary

judgment and plaintiffs seek an injunction against any further work on this project. Plaintiffs allege that defendants violated the National Environmental Policy Act ("NEPA") and the National Forest Management Act ("NFMA") in approving the project.

I. Factual and Procedural Background

A. The Nature of the Project

The stated goal of this project is to "manage the landscape toward a condition that will be resilient to catastrophic fire and other widespread disturbances.[1] The intent is not to maintain this landscape in a static condition." (Environmental Assessment ("EA"), Administrative Record ("AR") 412).

Defendant FS considered two alternatives in detail. The first alternative was a "no action alternative," in which "[n]o forest health or fuels reduction activities would occur on public lands." (Id. at 416). The second alternative was chosen by the FS. Under this plan, approximately 1,026 acres of forest stands in 53 units would be thinned in two general areas known as "Middle Creek" and "Scott Bar Mountain."[2] Units range in size from 2 to 46 acres. (Westpoint Project Wildlife Biological Assessment/Evaluation ("Wildlife BA"), AR 1008). The majority of the trees to be harvested would be 8 to 22 inches in diameter at breast height (dbh), with the average tree harvested being 16

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[1] These "other widespread disturbances" are nowhere identified.

[2] The units are not numbered sequentially. The term "Middle Creek" refers to both an area of proposed harvest as well as the creek itself, which flows into the Scott River in the general project area.

inches in diameter and 72 feet tall. (FONSI, AR 162). The fuels produced by this thinning would be treated in a variety of ways, mostly by controlled burning, to reduce the possibility of later fires. In addition, all stumps of Shasta red fir, white fir, and hemlock greater than twelve inches in diameter would be treated with a fungicide. The road network in the region would also be changed: 4.7 miles of roads would be decommissioned, 1.8 miles of temporary roads would be used and then hyrdrologically restored after the project, 6.8 miles of road would change from being closed year round to being closed seasonally, and 5.4 miles of road would change from being closed year round to being open year round. (EA, AR 413). Trees would be planted on 130 acres. (FONSI, AR 164). Finally, the plan would poison gophers in certain units to reduce the mortality of seedlings. (EA App. F, AR 174).

Units 53, 56, 59, and 25 are different from the other forty-nine units and are the source of much of the present controversy. Forty-two acres in Units 53 and 56 are classified as "late-successional" habitat. "Late-successional" habitat is defined as multi-storied Douglas-fir, conifer hardwood, and mixed conifer vegetation types with a minimum tree size of 24 inches dbh, a canopy closure of greater than 70%, and sufficient understory including slash, rotten logs, and stumps. (FONSI Appeal, AR 69). The FS found the thinning of this late-successional habitat "likely to adversely affect" the northern spotted owl ("NSO"), an endangered species. (Wildlife BA, AR 1027; see also id., AR 1022("Harvesting will result in the removal of 42 acres of [NSO] suitable habitat")). In addition,

these 42 acres provide potential nesting habitat for the northern goshawk, a species listed by the FS as "sensitive." (Id., AR 1029-30). These same 42 acres are also suitable habitat for two other sensitive species, the Pacific fisher and the California wolverine. (Id., AR 1032-35).

Three acres within unit 25 are within the Designated Recreational River land allocation for the Scott River, designated as a Scenic and Recreational River in the National Wild and Scenic River System. (FONSI, AR 166-67). Unit 59 contains an area designated as NSO Critical Habitat. (Wildlife BA, AR 1017).

B. Procedural History

Scoping for this project began in early 2002. The notice of intent to prepare an EA was published in the Siskiyou Daily News, which publishes out of Yreka, on March 14, 2002, and the Pioneer Press, which publishes out of Fort Jones, on March 20, 2002. The National Oceanic and Atmospheric Administration-Fisheries and the United States Fish and Wildlife Service were consulted. On June 13, 2003, the EA was circulated to those who had showed an interest in the project. (FONSI, AR 164).

The FS received comments on the EA from plaintiffs, among others. On October 15, 2003, the FS issued its FONSI, signed by defendant Boland, and appended to that document responses to some 80 comments. Plaintiffs appealed to the Appeal Deciding Officer. (AR 85). In an Appeal Decision Summary issued January 15, 2004, Appeal Deciding Officer Bernard Weingardt affirmed defendant Boland's FONSI. (AR 67-81).

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II. Discussion

A. Standing

Before considering the substantive merits of this suit, the court must determine that plaintiffs meet standing requirements. Defendants do not argue that plaintiffs lack standing. In his declaration, George Sexton states that he is an active member of plaintiff Klamath-Siskyou Wildlands Center, an organization formed to protect the Klamath-Siskyou ecosystem, and that he regularly spends personal and professional time in the Middle Creek and Scott Bar Mountain areas. Scott Greacen, in his declaration, states that he is an active member of plaintiff Environmental Protection Information Center, an organization formed to protect and restore Northwestern California ecosystems, and that he has visited and plans to return to the project area in the future. These facts are sufficient to confer standing on plaintiffs to bring this suit. See Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846, 859-862 (9th Cir. 2005)(discussing standing requirements in the context of suit under NEPA).

B. Summary Judgment Standard

Both plaintiffs and defendants now move for summary judgment pursuant to Federal Rule of Civil Procedure 56. The court must grant summary judgment to a moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party adverse to a motion for summary

judgment may not simply deny generally the pleadings of the movant; the adverse party must designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); see Celotex Corp. v. Catrett, 477 U.S. 317 (1986). Simply put, "a summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989). The non-moving party must show more than a mere "metaphysical doubt" as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

In this case, the court is called upon to review the findings of an agency adjudication. "Judicial review of an agency decision typically focuses on the administrative record in existence at the time of the decision and does not encompass any part of the record that is made initially in the reviewing court." Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). Materials outside the record may be allowed under three exceptions:

> (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, or (3) when supplementing the record is necessary to explain technical terms or complex subject matter.

Id. (quotation marks and citation omitted). The parties have not asked the court to look outside the record developed in the FONSI and its supporting documents, and the court finds that none of the three Southwest Center exceptions applies in this case. Therefore, the record will not be developed further and this case is ripe for summary adjudication.

C. Standard of Review

The court reviews the decision of the FS under the Administrative Procedure Act. Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005). The United States has waived sovereign immunity in this case under 5 U.S.C. § 702. See Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 804 (1999). The court must reverse the agency action only if the action is arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2). This standard is narrow, and does not permit a court to substitute its own judgment for that of the agency. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The court must ask "whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. The court must also determine whether the agency "articulated a rational connection between the facts found and the choice made." Ocean Advocates, 402 F.3d at 859(citation omitted).

D. NEPA

"NEPA exists to ensure a process, not particular substantive results." Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1177 (9th Cir. 2000). Here, there are two main issues under NEPA. The first issue is whether the FS was required to prepare an Environmental Impact Statement ("EIS") rather than the abbreviated Environmental Assessment. The second issue is whether the FS considered an adequate range of alternatives to the project.

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1. Necessity of an EIS

Plaintiffs challenge the failure of the FS to prepare an EIS for this project. The relevant provision of NEPA provides that "all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on – the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C). "Where an EIS is not categorically required, the agency must prepare an Environmental Assessment to determine whether the environmental impact is significant enough to warrant an EIS." Ocean Advocates, 402 F.3d at 864. If, after preparation of the EA, the agency decides not to prepare an EIS, it must put forth a "convincing statement of reasons [in the form of a FONSI] that explain why the project will impact the environment no more than insignificantly." Id.(citation omitted); see also 40 C.F.R. § 1508.13(listing requirements for a FONSI).[3] The FONSI is crucial to a court's evaluation of whether the agency took the requisite "hard look" at the potential impact of a project. Ocean Advocates, 402 F.3d at 864.

"[A]n EIS must be prepared if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998)(citation

[3] Unless otherwise noted, all citations to the Code of Federal Regulations are to the 2003 version, the version in effect at the time of the FONSI.

omitted)(emphasis in original)("Idaho Sporting Cong. I"). To trigger the requirement for an EIS, "a plaintiff need not show that significant effects will in fact occur[;] raising substantial questions whether a project may have a significant effect is sufficient." Id. at 1150(citation omitted)(emphasis in original).

40 C.F.R. § 1508.27 explains how an agency or court is to interpret "significantly" in 42 U.S.C. § 4332(2)(C). The regulation gives the term two components: context and intensity. Context refers to the setting in which it takes place. Intensity means "the severity of the impact." 40 C.F.R. § 1508.27.

Plaintiffs argue that the context of this project weighs in favor of requiring an EIS. They contend that defendants are implementing "a policy of old growth/late-successional logging within the Scott River Watershed." (Pls.' Mem. in Supp. of Summ. J. at 33). To support the existence of this policy, plaintiffs cite other projects occurring in the general vicinity. Plaintiffs also contend that the Scott River is an "impaired watershed." Defendants counter by noting that the projects to which plaintiffs refer are twenty-five miles away from Westpoint and, therefore, these projects should not be considered relevant to the context of the project. (Defs.' Mem. in Opp'n to Pls.' Mot. for Summ. J. at 22-23). Defendants further argue that plaintiffs have not defined what they mean by "impaired watershed" and point the court to documents in the record that show that watershed effects of the Westpoint project

would not be significant.[4] (Defs.' Reply at 14-15; see EA, AR 425(chart supporting defendants' assertions)).

In considering the severity of a project's impact, a reviewing agency should consider ten factors.[5] "[O]ne of these

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[4] Plaintiffs did define what they meant by "impaired watershed" in their initial memorandum in support of their motion. They claim that "[t]he Scott River is a 303(d) listed water body with sedimentation/siltation and temperature identified as water quality limiting factors. . . . The Middle Creek/Scott River subwatershed is impaired due to sediment and high temperature." (Pls.' Mot. for Summ. J. at 6); see also 33 U.S.C. § 1313(d)(Section 303(d) of the Clean Water Act, entitled "Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision"). The portion of the record plaintiffs cite for the proposition that the Scott River is a § 303(d) listed river does not support the proposition. However, the record does support the fact that some of the proposed harvesting would take place in a Wild & Scenic River Corridor, (AR 377 (map)), and that there are already high levels of sediment in the river. (Biological Assessment for Threatened, Endangered, Proposed, and Sensitive Species That May Be Affected by the Westpoint Vegetation Treatment Project ("Fish BA"), AR 494-95).

[5] The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects

factors may be sufficient to require preparation of an EIS in appropriate circumstances." Ocean Advocates, 402 F.3d at 865. Factor (1) should be kept in mind by a reviewing court as it considers the other factors. "A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. 1508.27(b)(1).

Plaintiffs argue that intensity factors (2), (3), (4), and (9) raise sufficient substantial questions regarding whether the project may have a significant effect to require an EIS. Plaintiffs have also made important arguments regarding factor (5) in their memoranda, although these arguments are not found under plaintiffs' EIS heading. Therefore, the court will address factor (5) as well.

> or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.
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> (8) The degree to which the action may adversely affect districts, sites, highways, structures, or object listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
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> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
>
> (10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

a. Degree of Effects on Public Health

Plaintiffs state that the poisoning of gophers with strychnine has the potential to cause secondary poisoning to other species, which in turn could come into contact with humans. In a separate argument, plaintiffs state that Middle Creek supplies water to some cabin owners, that the project will affect the water quality of the creek, and that "[t]he presence of domestic water use is also a basis to require an EIS." (Pls.' Mem. in Supp. of Summ. J. at 35).

The risk of secondary poisoning related to the gopher poisoning was considered in the EA. (EA App. F, AR 174). The EA cites studies conducted in 1997, 2001, and 2002, and concludes that "studies of gopher baiting have shown little risk of secondary poisoning." Id. The court defers to the agency in its assessment of scientific evidence, Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004), and therefore finds that the risk of secondary poisoning due to gopher baiting is not significant.

Regarding the domestic water usage, plaintiffs point to the Fish BA, which states that "[t]here are one or two small water diversions in lower Middle Creek near its confluence with the Lower Scott River. These supply streamside cabin owners with water. . . ." (AR 508). The FS points out that these "diversions" are in the form of springs used by cabin owners during the summer months, (Earth Scientist Report ("ESR"), AR 611) and that there are "no domestic uses of surface water in Middle Creek." (EA App. F, AR 191). The court thus finds that consideration of factor (2) does not support a finding that this

is a significant action.

b. Unique Characteristics of the Area

An area's "unique characteristics" are defined to include "ecologically critical areas." 40 C.F.R. § 1508.27(b)(3). Part of unit 59 is located within designated critical habitat for the NSO. (BA, AR 1017). Unit 59 is within 0.7 miles of a known NSO activity center and contains nesting and roosting habitat for the NSO. (BA Map, AR 1051).

The BA dismisses the potential effect on the Critical Habitat. The entire analysis is as follows:

> Unit #59 is contains [sic] an area mapped as NSO Critical Habitat (CA17) within the Matrix. This area of CHU in Matrix was analyzed by Level 1 Team and Forest wildlife biologists on September 8, 2001. Analysis determined this area of CHU in Matrix did not contain suitable NSO habitat and had no potential of reaching suitable habitat. the recommendation was to manage this as Matrix land.

(Wildlife BA, AR 1017). This analysis is lacking. The Forest Service may not unilaterally change a critical habitat designation to meet its needs on a given project. 16 U.S.C. § 1533(b)(3)(D)(notice and comment process must be followed to revise a critical habitat designation).[6] This harvesting within NSO critical habitat raises substantial questions about the project's environmental effects.

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[6] Plaintiffs brought this point to defendants' attention in both its initial memorandum and its response. Defendants, interestingly, chose not to address it.

c. Degree of Controversy

"A federal action is controversial if a substantial dispute exists as to its size, nature or effect." Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1122 (9th Cir. 2000)(citation omitted). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency's conclusions." Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2001)(citation omitted). Once this evidence is presented to the agency, the agency has the burden of demonstrating why this evidence does not create a controversy. Id. "The existence of opposition to a use, however, does not render an action controversial." Wetlands Action Network, 222 F.3d at 1122.

Plaintiffs and others wrote to the FS, prior to the preparation of the FONSI, demonstrating their concern about the reliability of the FS's assumptions. (AR 248-345, 348-64). The letters contain a brief synopsis of the reasons why logging larger trees is counterproductive to future fire suppression and refer to several articles on the subject. In contrast, the FS's Fuels and Fires Assessment is less academic in nature, and heavily relies on the Forest Vegetation Simulator and the First Order Fire Effects Model. (See AR 643). The Fuels and Fires Assessment does not provide any scientific support for the accuracy of these models. The FS also does not directly address the arguments of the scientists who claim that logging larger trees is not beneficial to fire suppression, other than claiming,

without support, that the models are "state of the art tools." (See Fuels and Fires Assessment, AR 645-48; FONSI, AR 182); compare Wetlands Action Network, 222 F.3d at 1122(in finding that a significant public controversy did not exist, the court noted that "a dispute as to the effect that the [proposed permitting action] would have on the environment did exist. During the two year review process, the [agency] was able to address these potential effects to the satisfaction of the federal resource agencies, for all of the agencies eventually withdrew their objections to the issuance of the permit"). Plaintiffs have raised substantial questions on whether this project is significantly controversial.

d. Uncertain or Unknown Risks

Plaintiffs argue that the FS left short-term fire risks, risks resulting from changes in the road network, as well as risks to the watershed, the soil, and sensitive species, unanalyzed. The FS prepared an adequate analysis of the short-term increase in the likelihood of fire, and concluded, after modeling the action and no-action alternative, that the decreased risk of stand replacing fire in the future justified the short term risk. (Fire and Fuels Assessment, AR 634-645). The FS also prepared an adequate soil and watershed analysis. (See ESR, AR 608-633). The FS also prepared an adequate analysis of the impact of the changes in the road system. (See Roads Analysis Process Paper, AR 1090-1105).

However, plaintiffs' argument that the effect of the project on certain sensitive species is uncertain has merit. In

addition to finding that the project was "likely to adversely affect" the NSO, the Wildlife BA briefly discussed the impact of the project on various sensitive species. The Wildlife BA finds that "42 acres of mature and older forest (potential goshawk nesting habitat) will be removed by harvest in units 53 and 56. This is unsurveyed habitat." (AR 1030) In the next sentence, the BA declares that "[t]he harvesting of these units will have a low potential of disturbing nesting goshawks." This conclusion is unsupported by any evidence, and therefore is not a "convincing statement of reasons." See Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213-14 (9th Cir. 1998)("The EA's cursory and inconsistent treatment of sedimentation issues, alone, raises substantial questions about the project's effects on the environment and the unknown risks to the area's renowned fish populations."). Similar cursory analysis is given to the Pacific fisher. (Id., AR 1033)("The Westpoint Project proposes to harvest 51 acres of suitable habitat. It is unknown if these 51 acres are occupied. . . . The implementation of the proposed timber harvest will result in an overall removal of 50 acres of mature and older forest [and] will no longer provide potential reproductive habitat quality."). About the California wolverine, the Wildlife BA states "there is some evidence, although somewhat dated (1973) the numbers [of California wolverines] appear to be increasing in California." (AR 1034). The California wolverine would also lose 42 acres of habitat, and "[t]here is a potential for secondary poisoning to occur" due to the gopher baiting. (Id., AR 1035). The FS was also uncertain in its analysis of the

effects on the American marten. "No formal surveys for [American marten] have been conducted in the area." (Id., AR 1036). The American marten would lose 27 acres of suitable denning habitat. (Id., AR 1037). The FS also does not know the effect of the project on the pallid bat. "[S]urveys have not been conducted." (Id., AR 1037-38). There would be a degradation in 1,026 acres of pallid bat habitat. (Id., AR 1038). These examples show that the FS has not conducted surveys on sensitive species despite specific instruction to do so in the Forest Management Plan Standards & Guidelines. (AR 2236)("Project areas should be surveyed for the presence of Sensitive species before project implementation. If surveys cannot be conducted, project areas should be assessed for the presence and condition of Sensitive species habitat.")(emphasis added). Plaintiffs have succeeded in raising substantial questions about the significance of uncertain or unknown risks. See Friends of the Clearwater v. Dombeck, 222 F.3d 552, 558 (9th Cir. 2000)(finding that Forest Service had to prepare a supplementary EIS after seven species were newly designated as sensitive).

e. Relation to Other Actions

Plaintiffs argue that defendants did not consider "the Whittler, the Jack Heli, and the Jack conventional timber sales." (Pls.' Mem. in Supp. of Summ. J. at 30). However, defendants convincingly argue that, since these projects are twenty-five miles away from the Westpoint project, they were reasonably not included in the cumulative effects analysis. See Idaho Sporting Cong. v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002)("Idaho

Sporting Cong. II")("Ordinarily, an agency has discretion to determine the physical scope used for measuring environmental impacts").

No documents in the record analyze the cumulative effect of this project with the Jack Heli, the Whittler, and the Jack conventional timber sales. However, the Wildlife BA analyzes the effects of other projects on sensitive species, and concludes, for each species, that these other projects will not impact the sensitive species' habitat. (AR 1025-45)(discussing effects of "Scott Bar Mountain Fuels Reduction Project," and "Pre-commercial Thinning Project" on sensitive species).

Plaintiffs argue that defendants do not consider the cumulative effects of this project, the Scott Bar Mountain Fuels Reduction Project and the Pre-commercial Thinning Project on the Middle Creek watershed. In its response, the FS points the court to the Earth Scientist Report, which contains a subsection entitled "Cumulative Watershed Effects." (AR 619-25). Nowhere in these pages, however, does the ESR discuss the effects of other projects, such as the Scott Bar Mountain Fuels Reduction Project and the Pre-Commercial Thinning Project, on the Middle Creek Watershed. The use of the word "cumulative" in this portion of the report is deceptive, as it does not refer to the cumulative effects of this project along with others, but only the "cumulative effects" of "units within the project area." (ESR, AR 619). See Ocean Advocates, 402 F.3d at 868("This cumulative analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past,

present, and future projects.")(citation omitted). Plaintiffs have succeeded in raising substantial questions about the significance of cumulative watershed effects.

f. Adverse Effect on Endangered Species

The Wildlife BA frankly states that this project is "likely to adversely affect" the NSO. The question is whether that is enough to raise substantial questions about the significance of this project's effect on the NSO. The law on this question does not provide clear guidance. Compare W. Land Exch. Project v. United States Bureau of Land Mgmt., 315 F.Supp 2d 1068, 1090-92 (D. Nev. 2004)(finding that, even though the agency concluded that "there [was] no evidence that [the project] will result in significant impacts to the desert tortoise [a threatened species]," the fact that the agency "acknowledged that direct and indirect impacts to a federally listed species could occur" was sufficient to raise a substantial question in the 40 C.F.R. § 1508.27(b)(9) context) with Heartwood, Inc. v. United States Forest Serv., 380 F.3d 428, 431-32 (8th Cir. 2004)(finding that, although the Biological Opinion concluded that "adverse effects are likely to occur to the Indiana bat [an endangered species]," the degree to which the bat was adversely affected was small, and therefore plaintiffs had not raised a substantial question in the 40 C.F.R. § 1508.27(b)(9) context).

This court finds that the likelihood of adverse effects to the NSO, combined with the removal of NSO critical habitat already discussed, raises substantial questions about the significance of this project's effect on the NSO. The Wildlife

BA finds that 42 acres of suitable nesting habitat will be removed, (AR 1019), and that 138 acres of dispersal habitat will be removed. (AR 1020). The removal of this dispersal habitat "will slightly increase fragmentation of the NSO habitat" as "[t]he Klamath Mountains provide an important dispersal habitat linkage between the Cascades, Sierra Nevada's [sic] and the coast range." (AR 1019, 1016)(emphasis added). Although the FS concludes that the project "will result in an approximate less [sic] than 0.01% reduction of NSO suitable habitat" across Forest Service land, (AR 1019), the significance of removing this "important dispersal habitat linkage" should be further explored in an EIS.

2. Adequacy of Alternatives

NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E); see also 40 C.F.R. § 1508.9(discussion of alternatives required in an EA); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988)("[C]onsideration of alternatives is critical to the goals of NEPA even when a proposed action does not trigger the EIS process"); Akiak Native Cmty. v. United States Postal Serv., 213 F.3d 1140, 1148 (9th Cir. 2000)(noting that EA must consider a reasonable range of alternatives). Because the Ninth Circuit has recognized that an EA, like an EIS, must include a reasonable range of alternatives, the court draws upon case law with respect to alternatives

developed in an EIS. Defendants cite an Eighth Circuit case for the proposition that the range of alternatives an agency must consider under NEPA is smaller when preparing an EA than when preparing an EIS, but that proposition is unsupported by Ninth Circuit case law. (Defs.' Reply Mem. at 18); see Olmsted Citizens for a Better Cmty. v. United States, 793 F.2d 201, 208 (8th Cir. 1986).

The choice of alternatives is bounded by some notion of feasibility and an agency is not required to consider remote and speculative alternatives. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 551 (1978). An agency is not required "to undertake a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered." Westlands Water Dist. v. United States Dep't of the Interior, 376 F.3d 853, 868 (9th Cir. 2004)(citation omitted). The touchstone for a court's inquiry into the adequacy of the alternatives considered is whether the discussion of alternatives fosters informed decision-making and public participation. Id.

Here the agency considered in detail two alternatives.[7] The first alternative, the no-action alternative, was described in the EA:

> No forest health or fuels reduction would occur on public lands in the project area at this time. Management in the area would include regular administrative activities required to manage special uses, recreation, maintain roads,

[7] The FS also summarily dismissed two other alternatives, a "no-harvest, restoration only alternative" and a "chemical-free alternative." (EA, AR 420).

> suppress fires, and reduce fuels. Future stand conditions would be determined by natural or human-caused events (for example, human-caused wildfire).

(AR 416). The second alternative was the one chosen by the FS and is the subject of this litigation.

In Muckleshoot Indian Tribe, the Forest Service considered "only a no action alternative along with two virtually identical alternatives." 177 F.3d at 813. The court found that the Forest Service had failed to consider adequate alternatives. Id. at 814. The present case is more extreme. The no-action alternative, the only alternative that the FS considered in detail, was one that clearly did not meet the stated goal of the project, and thus the selection of alternative two was preordained. (See EA, AR 412)("The goal is to manage the landscape toward a condition that will be resilient to catastrophic fire and other widespread disturbances. The intent is not to maintain this landscape in a static condition.") (emphasis added).

In this case, there was an obvious, viable alternative that the FS did not consider. The FS should have considered an option which would exclude from harvest units 53, 56, 59, and 25, and would substitute other parts of the forest that do not contain critical habitat for an endangered species, nesting habitat for that species, or an area designated as Recreational River land. The existence of a viable but unexamined alternative shows that an adequate range of alternatives was not considered. Westlands, 376 F.3d at 868. Defendants do not point to any part of the record explaining the basis for choosing the land for this

project, nor does the record explain why harvesting in units 53, 56, 59, and 25 is vital to the project.[8] If the FS chooses to go forward with the project and prepare an EIS, it must consider obvious, viable options.[9]

E. NFMA

The National Forest Management Act requires the FS to create a comprehensive Forest Plan for each national forest. Lands Council, 395 F.3d at 1032(citing 16 U.S.C. §§ 1604(a), (e)). "Once the Forest Plan is adopted, NFMA prohibits any site-specific activities that are inconsistent with the Forest Plan." Id. at 1033.

1. Viability

Plaintiffs' first NFMA argument is that the Forest Plan does not ensure the viability of the NSO, an endangered species, and the coho salmon, a species designated as threatened under the Endangered Species Act ("ESA"). Under 36 C.F.R. § 219.19 (1994),[10] the FS has a duty to formulate its plans such that

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[8] Plaintiffs provide a cynical explanation of the reason for harvesting in units 53 and 56, pointing to an internal document authored by District Ranger Ray Haupt. (See AR 1380)("commercial timber offering is the goal of this project")(emphasis added). That may very well be a legitimate goal of the project, but if so it should be clearly stated in the documents that the FS provides to the public.

[9] Plaintiffs make one more NEPA argument, claiming that the public has not been involved. This argument is without merit, as the numerous submitted comments on the project by plaintiffs and others demonstrate that the public was involved in this process.

[10] The Klamath National Forest Plan issued in 1994. (See AR 2165-2459). The regulation at issue was amended in 2000, and is very different from what it was in 1994.

"viable populations of existing native and desired non-native vertebrate species in the planning area" shall be maintained. The same section defines a viable population as "one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area."

Plaintiffs argue that the present project would render the NSO and the coho salmon not viable. They argue that, since the purpose of the ESA is to allow a species to recover, any FS project that would impair that recovery is unlawful.

In evaluating plaintiffs' argument, a key distinction between NFMA and NEPA must be highlighted. NEPA is a statute governing the FS's procedure in making its determinations in this case. NFMA, by contrast, is a substantive control on the FS's actions. See Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 757-58 (9th Cir. 1996)(comparing the two acts). This court is in a much better position to evaluate the procedures the FS followed or failed to follow than it is to sift through the scientific evidence and evaluate the ultimate findings of the FS. See Norton v. S. Utah Wilderness Alliance, 124 S.Ct. 2373, 2381 (2004)(a principal purpose of the APA is "to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve"). Furthermore, this court's finding that an EIS is required before this project may go forward renders any ruling on substantive violations of the NFMA tentative at best. If and when an EIS is prepared, the parties will likely return to this court to dispute

the substance of the EIS. Hopefully the EIS will contain a more complete evaluation of the effects of this project on the NSO, and the court considers it more efficient to delay any decision on any substantive violation of this regulation under the NFMA until that time.[11]

2. Management Indicator Species

Plaintiffs' second NFMA argument is that the FS failed to measure the effect of the project on Management Indicator Species ("MIS").[12] "NFMA requires that the Forest Service identify Indicator Species, monitor their population trends, and evaluate each project alternative in terms of the impact on both Indicator Species habitat and Indicator Species populations." Lands Council, 395 F.3d at 1036. These Indicator Species serve as a proxy for the relative health of other species that rely on the same habitat.

In this case, the FS used the "proxy-on-proxy" approach, in which the population trends of the Indicator Species are evaluated by evaluating the habitat in which those Indicator Species live. See id. The Ninth Circuit has found this method allowable in appropriate cases, but the methodology for identifying the habitat proxy must be sound. Id.; see also Inland Empire, 88 F.3d at 760(deferring to agency's interpretation of its own regulations to find that proxy-on-proxy

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[11] The FS considers Middle Creek not to be occupied by coho salmon. (Fish BA, AR 505).

[12] The court addresses this NFMA argument because it is easily disposed of at this stage.

approach was suitable under § 219.19).

Plaintiffs argue that the FS's methodology is flawed. (Pls.' Mem. in Supp. of Summ. J. at 49)("the Forest Service has failed to put forward any date to indicate that its methods of assessing habitat and habitat relationships are fact accurate"). However, plaintiffs do not point to any particular methodological flaw. Compare Lands Council, 395 F.3d at 1036("Here, there is evidence that the Forest Service's main tool for old growth calculation, the timber stand management reporting system database . . ., was inaccurate."). The court has analyzed the Westpoint MIS assessment, (AR 655-81), and does not find the requisite flaws with the analysis are present so that the proxy-on-proxy approach is not permissible. The court defers to the FS's expertise in developing the appropriate model for measuring the population trends in the MIS.

III. Injunctive Relief

To determine whether injunctive relief is an appropriate remedy for an agency's failure to prepare an environmental impact statement, a court must apply the traditional balance of harms analysis. Nat'l Parks, 241 F.3d at 737. Absent unusual circumstances, injunctive relief is the appropriate remedy for a violation of NEPA. Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1496 (9th Cir. 1995).

In this case, legal remedies would be inadequate. Plaintiffs do not seek money damages. Even if they did, it would be virtually impossible to quantify the damages resulting from

the FS's failure to prepare an EIS. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987)("Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment."). In this case, if the FS were allowed to go forward without preparing an EIS, irreparable damage would be done. The public interest also weighs in favor of granting an injunction, as that interest is expressed in the NEPA statute and the ESA. On the other hand, if an injunction issues the FS will be unable to collect the value of the timber to be harvested. However, after the FS has complied with its obligations under NEPA, assuming it chooses to go forward with this project, it may be able to collect the value of the timber. Therefore, the balance of harms clearly favors the plaintiffs in this case.

Given the above, the court grants plaintiffs' request for injunctive relief. Defendants are enjoined from proceeding with the Westpoint project until such time as the Forest Service satisfies its NEPA obligations. See Muckleshoot Indian Tribe, 177 F.3d at 815(similar injunction).

IT IS THEREFORE ORDERED that:

(1) plaintiffs' motion for summary judgment be, and the same hereby is, GRANTED, and defendants' motion for summary judgment be, and the same hereby is, DENIED, to the extent that the defendants violated NEPA by failing to prepare an

Environmental Impact Statement and by failing to consider an adequate range of alternatives;

(2) defendants' motion for summary judgment be, and the same hereby is, GRANTED, and plaintiffs' motion for summary judgment be, and the same hereby is, DENIED, to the extent that defendants did not violate NFMA;

(3) defendants be, and hereby are, PERMANENTLY ENJOINED from proceeding with the Westpoint project. Should the FS at some point in the future comply with NEPA, it may move this court to dissolve this injunction.

DATED: May 4, 2005

WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE